SUPREME COURT, U. S.

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
OCT 19 1970
ROBERT SEAVER, CLERK

OCTOBER TERM, 1970.

No. 871

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,
Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI BY DAY-GLO COLOR CORP., ROBERT C. SWITZER AND JOSEPH L. SWITZER, PETITIONERS.

THOMAS V. KOYKKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

October 15, 1970.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

TABLE OF CONTENTS.

PETITION FOR CERTIORARI BY DAY-GLO COLOR CORP., ROBERT C. SWITZER AND JOSEPH L. SWITZER, PETITIONERS 1

OPINIONS 2

JURISDICTION 3

QUESTIONS PRESENTED 4

STATUTE AND RULES INVOLVED 6

STATEMENT OF THE CASE 7

—The Business Involved 7

—The Damages 8

(i) The prior adjudication has been disregarded 9

(ii) Damages have been awarded for "lost sales" not caused by antitrust violation .. 11

(iii) Damages have been awarded by counting as "lost sales" even merchandise returned as "unsatisfactory"—and then applying multiplying factors to such "lost sales" .. 13

(iv) "Lost sales" award rests on estimates short of standards the law requires—or should 15

(v) If errors in arithmetic alone are corrected, the profit rate on "lost sales" will be 15%, and not the 16% here allowed 16

—The Clearly Erroneous Rule 17

—Attorney's Fee 18

—The Settlement 20

—Treble Damages 20

REASONS FOR ALLOWANCE OF WRIT 22

I. Standards governing damages in private antitrust suits desperately need to be clarified 22

—(a) Award disregards adjudicated findings .. 22

—(b) Award includes losses not caused by antitrust violation 22

—(c) Award counts as "lost sales" goods returned because customers found the product was "unsatisfactory" 22

—(d) Award substitutes for appraisal by the owners, estimates by experts 23

—(e) Award converts mistakes in arithmetic into damages 23

II. Clearly erroneous rule has been misapplied 23

III. Standards governing attorney's fee allowances in private antitrust suits need to be declared ... 23

IV. Joint tortfeasor rule should be held to apply to antitrust actions 23

V. Whether statute requires damages to be trebled should be determined 23

CONCLUSION 24

APPENDIX (Separately printed):

OPINION OF WHICH REVIEW IS SOUGHT, adjudicating antitrust damages, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp. (formerly Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer* (7 C.A., 1970), 429 F.2d 873 ---------- 1

JUDGMENT OF WHICH REVIEW IS SOUGHT, entered June 26, 1970 ---------- 23

ORDER DENYING REHEARING, entered September 15, 1970 ---------- 24

OPINION OF THE DISTRICT COURT, entered by Judge Decker, affirmed in the judgment of which review is sought ---------- 25

JUDGMENT ENTERED BY THE DISTRICT COURT, Judge Decker, and affirmed in the judgment of which review is sought ---------- 31

FINDINGS OF FACT AND CONCLUSIONS OF LAW entered by Judge Miner in the original action, finding antitrust violation ---------- 34

JUDGMENT ENTERED BY JUDGE MINER in the original action adjudging antitrust violation ---- 47

OPINION OF THE COURT OF APPEALS affirming Judge Miner's decision, adjudging antitrust violation, *Switzer Brothers, Inc., Robert C. Switzer v. Locklin and Brant, d/b/a Radiant Color Company* (7 C.A., 1961), 297 F.2d 39 ---------- 51

TABLE OF AUTHORITIES.

Cases.

Bigelow (1946), 327 U.S. 251 22

Cicero Amusement Co. v. RKO Radio Pictures (N.D. Ill., 1953), CCH 1953 Trade Cases, ¶ 67,520 21

Eastman Kodak (1927), 273 U.S. 359 22

Haskell v. Perkins (D.C. N.J., 1928), 28 F.2d 222, reversed on other grounds (3 C.A., 1929), 31 F.2d 53, certiorari denied (1929), 279 U.S. 872 21

Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp., CCH 1969 Trade Cases ¶ 72,705 2

Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp. (7 C.A., 1970), 429 F.2d 873, CCH 1970 Trade Cases ¶ 73,241, 166 U.S.P.Q. 164 2

Rogers v. Douglas Tobacco Board of Trade, Inc. (5 C.A., 1957), 244 F.2d 471, certiorari denied (1959), 361 U.S. 833 21

Story Parchment (1931), 282 U.S. 555 22

Sun Theatre Corp. v. RKO Radio Pictures, Inc. (7 C.A., 1954), 213 F.2d 284 21

Switzer Brothers, Inc. v. Locklin and Brant, d/b/a Radiant Color Company (7 C.A., 1961), 297 F.2d 39, certiorari denied (1962), 369 U.S. 851 ..... 3, 8

Zenith Radio (1969), 395 U.S. 100 22

Statutes.

15 U.S.C. 1 (Sherman Act, Sec. 1) ---------- 1-2
15 U.S.C. 2 (Sherman Act, Sec. 2) ---------- 1-2
15 U.S.C. 14 (Clayton Act, Sec. 3) ---------- 2
15 U.S.C. 15 (Clayton Act, Sec. 4) ---------- 6, 7, 12, 20
28 U.S.C. 1254(1) ---------- 3
28 U.S.C. 1337 ---------- 7

Federal Rules of Civil Procedure.

Rule 52(a) ---------- 5, 6
Rule 53(e)(2) ---------- 5, 6

Other.

CCH *Trade Regulation Reports*, No. 473, July 6, 1970, page 5 ---------- 7

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,
Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI BY DAY-GLO COLOR CORP., ROBERT C. SWITZER AND JOSEPH L. SWITZER, PETITIONERS.

Now come petitioners, Day-Glo Color Corp. (formerly known as Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer, brothers, sole shareholders in said corporation, and petition this Court to grant its writ of certiorari to review the judgment entered by the United States Court of Appeals for the Seventh Circuit, in cause No. 17,730, determining damages payable by petitioners Day-Glo, *et al.*, to respondents Radiant, *et al.*, in a private antitrust suit. The adjudicated antitrust violation (of Sections 1 and 2 of the Sherman Act

and Section 3 of the Clayton Act, 15 U.S.C. Sections 1, 2, 14) was a misuse of two Switzer patents and its Day-Glo trade-marks by Switzer's grant of licenses under the patents, conditioned on the purchase of needed, but unpatented, fluorescent materials from Switzer or from sources designated by Switzer.

OPINIONS.

The questions this case brings here for review spring from:

Opinion of the United States Court of Appeals for the Seventh Circuit, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp.* (7 C.A., 1970), 429 F.2d 873, CCH 1970 Trade Cases ¶ 73,241, 166 U.S.P.Q. 164, entered by District Judge Grant, Chief Judge Swygert and Circuit Judge Kiley, affirming the determination of antitrust damages, reproduced in the Appendix hereto, printed under separate cover, page 1.

Opinion of the District Court, Judge Decker, in the Northern District of Illinois, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp.* CCH 1969 Trade Cases ¶ 72,705, affirming the report of the special master assessing damages, reproduced in the Appendix hereto, page 25.

Findings of Fact and Conclusions of Law, entered in the original action by Judge Miner in the Northern District of Illinois (adjudicating the antitrust violation for which damages are now awarded), reproduced in the Appendix, page 34.

Judgment entered by Judge Miner, adjudicating the antitrust violation and referring the case to a master, reproduced in the Appendix hereto, page 47.

Opinion of the United States Court of Appeals for the Seventh Circuit in the original action, affirming Judge Miner's decision, adjudicating the antitrust violation, *Switzer Brothers, Inc. v. Locklin and Brant, d/b/a Radiant Color Company* (7 C.A., 1961), 297 F.2d 39, certiorari denied (1962), 369 U.S. 851 (by District Judge Mercer and Circuit Judges Schnackenberg and Kiley), reproduced in the Appendix hereto, page 51.

JURISDICTION.

The judgment sought to be reviewed is dated, and was entered, June 26, 1970. (App. p. 23.)

Petition for rehearing was denied by order dated, and entered, September 15, 1970. (App. p. 24.)

This Court has jurisdiction to review by writ of certiorari pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

This case presents the questions:

1. Whether erroneous standards for measuring antitrust damages have been declared, and applied, particularly:

(a) Whether, after it has been adjudicated that specific items of damage, in specific time periods, resulted from antitrust violation, damages may be allowed in disregard of such adjudication.

(b) Whether damages may be allowed not only for "lost sales" resulting from the antitrust violation, but also for sales "lost" from causes unrelated to the antitrust violation.

(c) Whether calculation of "lost sales" may be based on "gross sales" where the effect is (i) to treat as sales "lost," goods returned by purchasers because they found the wares "unsatisfactory," and (ii) to include nonrelevant items in the calculation (such as credits, allowances, and sales of unrelated products) as if they were "sales" lost by the antitrust violation, and where, moreover, the errors thus introduced are then ballooned by applying multiplying factors to these items.

(d) Whether "estimates" (by accountants unacquainted with the business) based on such use of "gross sales," satisfy the standards of proof required to establish antitrust damages.

(e) Whether, when damages are calculated on "lost sales," a judgment based on a profit of 16% on such sales may be upheld (i) when correction

of mathematical errors alone (but accepting every other determination) produces 15%, and (ii) when, in the five-year period after the master found all effects of the antitrust violation terminated, the claimant earned 10%.

2. Whether Rule 52(a) (that a master's findings, to the extent adopted by the court, shall be deemed findings of the court), and Rule 53(e)(2) (that the court shall accept the master's findings "unless clearly erroneous") have been misconstrued and misapplied.

3. Whether attorney's fees in a private antitrust case (i) may be granted for issues lost, or (ii) may be based on the factfinder's judgment, where the claim is unsupported by contemporary records (except in a few instances) and rests upon allocations made from old charges and invoices, on the basis of recollection of events going as far back as ten years.

4. Whether settlement by an antitrust claimant of claims against a co-conspirator, without reserving rights against others, operates as a matter of law (in an antitrust case, as in others) to discharge also claims against all other joint participants in the same wrong.

5. Whether damages under the antitrust law must be trebled even where, as here, the violation is found by the court to have been without malice, without conscious purpose to violate the antitrust laws, and in the good-faith belief that the program followed was warranted by the patent and trademark laws of the United States.

STATUTE AND RULES INVOLVED.

The case turns on Section 4 of the Clayton Act (Act of October 15, 1914, Chapter 323, Section 4, 38 Stat. 731, 15 U.S.C. 15), which says:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Also involved is the construction of Rule 52(a) of the Federal Rules of Civil Procedure, which, so far as here material, says:

> "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court"

and Rule 53(e)(2), which, so far as here material, says:

> "the court shall accept the master's findings of fact unless clearly erroneous."

STATEMENT OF THE CASE.

This is a private antitrust suit, brought in the District Court under 28 U.S.C. 1337 and 15 U.S.C. 15. It comes here on the issue of damages, liability having been heretofore adjudicated, and presents important questions concerning standards by which damages are to be measured. They are questions of obvious and immense importance in all antitrust actions.

The nature of the case is indicated by the summary published by the editors of the Commerce Clearing House *Trade Regulation Reports*, who compressed the holding below into this sentence:

> "Imprecision, erroneous factors, inconclusive evidence, and the use of gross sales in calculating lost profits did not spoil the judgment." [1]

Before turning to see how this has come about, it will be useful to note—

—The Business Involved.

The parties are engaged in the development, manufacture, and marketing of daylight fluorescent colors. Such colors have the quality of intensifying the reflection of sunlight, producing a brilliance up to four times that of ordinary colors. The products are marketed chiefly in the form of:

1. Silk screen colors utilized by silk screen printers and also frequently seen in emergency warning signs, policemen's gloves, advertising posters, and the like, and
2. Paper coated with daylight fluorescent colors used chiefly in advertising.

---

[1] CCH *Trade Regulation Reports*, No. 473, July 6, 1970, page 5.

The Switzer brothers (partners, and then the sole shareholders of Switzer Brothers, Inc., now by change of corporate name known as Day-Glo Color Corp.) pioneered in this area, and produced a product new to the world. Previous experience in initially launching their business in Canada, the Master found, led the Switzers, in starting their business in this country, "to conclude that a licensing program was necessary" (MR p. 24 ¶ 4)[2] to assure the satisfactory use of their discoveries. It turned out that the licensing program (carried out under guidance of counsel) was adjudged a prohibited "tie in" in violation of the antitrust laws. *Switzer Brothers, Inc. v. Locklin* (7 C.A., 1961), 297 F.2d 39, certiorari denied (1962), 369 U.S. 851.

That is now water over the dam. The case comes here on subsequent proceedings for assessment of—

—The Damages.

The damages awarded by the judgment below were determined by a master, affirmed by Judge Decker in the District Court in Chicago (to whom the case was assigned following the death of Judge Miner who heard the original case and referred it to a master), and affirmed by the Court of Appeals for the Seventh Circuit in the decision of which review is sought.

The original judgment entered by Judge Miner (and affirmed on appeal in the prior proceedings) determined that five items of damage resulted, *viz.*:

Finding 29: "Radiant Color Company has been directly damaged by the Switzer license program

---

[2] The designation MR indicates Master's Report.

> *in the respects* noted in Findings 30 to 34 below, and possibly in others." [3] (App. p. 43.)

The five items of damage thus adjudicated were (1) expense in counteracting the Switzer program, (2) expense in defending a customer in Chicago in Switzer's patent infringement suit, (3) expense in defending a customer in Cleveland in Switzer's patent infringement suit, and—two more, defined in Judge Miner's Findings 33 and 34. These two items adjudged:

> Finding 33: "*Commencing shortly after June 5, 1952*, Radiant's market in Velva-Glo paper became depressed * * *."
>
> Finding 34: "*Commencing shortly after February 9, 1953*, Radiant's market in Velva-Glo silk screen colors became depressed * * *." (App. p. 43.)

With respect to the first three items of damage, Judge Miner fixed both the commencement date and the termination date of damages; on the last two items—which account for the bulk of the damages awarded, and on which the erroneous standards of measurement applied below took effect—Judge Miner fixed the date when Radiant's market for paper became depressed (1952), and when Radiant's market for silk screen color became depressed (1953), but did not fix the termination dates. (App. p. 43.)

(1) The prior adjudication has been disregarded.

The master disregarded the adjudicated commencement dates of 1952 and 1953 in awarding damages for

---

[3] Emphasis supplied throughout except as otherwise indicated.

asserted "lost sales" of paper and silk screen colors. On these items the master instead awarded damages *"Commencing January 1, 1949"*—and ending December 31, 1956.

The award gives Radiant damages Judge Miner rejected. Judge Miner *refused to make the following finding requested by Radiant:*

> *"Commencing January 1, 1949,* and continuing down to the present date the false publicity of Switzers and the threats of patent infringement litigation have forestalled the normal growth of business of Radiant, and Radiant has lost the normal profit on such business." (R. 1852.)

Instead, Judge Miner found—and all courts affirmed —that damages did not commence until 1952 (with respect to paper) and 1953 (with respect to silk screen colors).

Moreover—and this makes the scuttling of the adjudicated findings of the prior appeal all the more remarkable—Radiant took a cross appeal in the prior proceedings, *but did not appeal—indeed, did not mention—Judge Miner's rejection* of Radiant's requested finding that its business was damaged "Commencing January 1, 1949 * * *." Instead, Radiant complained:

> "there is some room for ambiguous construction by the Master in the language 'possibly in others' used [by Judge Miner] in Finding 29." [4]

The Court of Appeals, in the prior proceedings, affirmed Judge Miner's findings fixing the 1952 and 1953 commencement dates, and disposed of Radiant's cross appeal by pointing out that Judge Miner's findings:

> "do not purport to limit the scope of inquiry upon the trial *as to the amount* of damages." (App. p. 70)

---

[4] Radiant's brief in support of its cross appeal in the prior proceedings, pages 99-100.

and that, since Radiant is not restricted in the scope of its proof as to the amount of damages, it "has no cause to complain that finding 29 [with its assertedly ambiguous "possibly in others" language] might have been more specifically cast." 297 F.2d at 49. (App. p. 70.) The court did not modify, but instead *affirmed*, Judge Miner's Findings 33 and 34—adjudging that Radiant's market for paper and silk screen colors "became depressed" commencing in 1952 (for paper) and 1953 (for silk screen colors).

Despite these findings, damages have been awarded for "lost sales" of these products "commencing January 1, 1949"—three and a half years earlier (in the case of paper) and more than four years earlier (in the case of silk screen colors) than was adjudicated in the prior proceedings.

(ii) Damages have been awarded for "lost sales" not caused by antitrust violation.

With respect to silk screen colors, the master found, and the Court of Appeals agreed:

> "the record shows that Radiant limited its market [by contract before it began business and before any act by Switzer], did not offer silk screen until the third year of the damage period, had no intent to enter the silk screen market, produced a defective product which had to be withdrawn, finally produced acceptable silk screen but it was inferior to Switzer's, and later achieved product equality with Switzer but only by infringing the latter's patent [a patent covering resins utilized in making daylight fluorescent colors and in no way involved in the original litigation]." (App. p. 13.)

With respect to coated paper the master found, and the Court of Appeals agreed:

"the record shows that Radiant was without competition for the first three years of the damage period [because Switzer marketed no paper until it licensed Crocker-Burbank which got into production in 1952], lost part of the market due to a third party competitor [i.e. Crocker-Burbank] which had a better product and distribution system complemented by lower prices, recaptured some of the market only by infringing on patents, and strained its production facilities to the breaking point, resulting in customer complaints and order cancellations for late delivery which further deteriorated its distribution network." (App. pp. 13-14.)

The master found the damages awarded "resulted from

(1) Switzers' unlawful conduct *and*

(2) the contributing factors of Radiant's production and sales problems" (MR p. 140, ¶ 10)

and put the question:

"In determining the *amount* of that *damage* do we sever (1) and (2)?" (MR p. 140, ¶ 10.)[5]

The master answered: "I think not." (MR p. 140, ¶ 10.)

Surely the master erred. Surely a mistaken standard has been applied. Surely damages resulting from the claimant's own problems must be separated from damages resulting from the antitrust violation. Surely only such damages may be allowed as are incurred "by reason of" acts "forbidden in the antitrust laws * * *." 15 U.S.C. 15.

---

[5] The emphasis is the master's.

(iii) Damages have been awarded by counting as "lost sales" even merchandise returned as "unsatisfactory"—and then applying multiplying factors to such "lost sales."

How "defective"—as the Court of Appeals put it—was the product offered by Radiant, may be judged from the fact that Radiant's general silk screen market customers *returned, as "unsatisfactory," 44.8% of the silk screen colors* Radiant sold in 1953 and *44% in 1954*—in the fifth and sixth years of the master's "lost sales" awards (R. 1795)—before Radiant had achieved, as the master and the Court of Appeals put it, "equality with Switzer." (App. p. 13.)

The sales so undone—because customers found the product "unsatisfactory"—*are treated as "lost sales"* in the damage award. This is because the master made his calculations of "lost sales" (during the first six years of his eight years of "lost sales") on the basis of Radiant's *gross sales*. The gross figures so used were swollen *by six categories of nonrelevant items*—including goods returned by customers as "unsatisfactory"—thereby increasing the "lost sales" damages awarded. The Court of Appeals said:

> "Net sales *would have excluded* six types of items—credits, returns, allowances, products other than daylight fluorescent products, government sales, and foreign sales." (App. p. 16.)

The calculation is even worse. To gross sales the master *applied a multiplying factor* to arrive at what, "but for" Switzer, would have been Radiant's sales. For example, the master determined Radiant's sales "but for" Switzer in 1949 (in Radiant's first year of business) *by multiplying* Radiant's *gross sales* in that year by 2½. Since the multiplier was applied to *gross* sales, every erroneous inclusion, *even of returned merchandise*, was thereby

multiplied, and the thus inflated figure treated as "lost sales."

In the last two years—of the eight years of "lost sales"—the master, without explanation, switched to a different method of computation. He rejected what Radiant's estimators of damage had said, and on his own, without support anywhere in the record, ruled that in those years Radiant's sales, "but for" Switzer, would have equalled Switzer's—to the penny. In making the computation on the new method, the master computed Radiant's "lost sales"—in these years—*as being the exact difference between Radiant's sales and Switzer's.* However, in measuring the difference (to be awarded to Radiant as "lost sales") the master took, not Radiant's *gross* sales (which he had used in the first six years when he determined "lost sales" by applying multiplying factors to *gross* sales), but instead started with the *lower* figure represented by Radiant's *net sales.* This made the difference greater. Had the master continued to use Radiant's gross sales—instead of switching in these years to *net* sales for Radiant—the difference between Radiant's *gross* and Switzer's *net* sales [6] would have produced a smaller amount of so-called "lost sales."

Thus, *both* methods used by the master operate to inflate the "lost sales" award. Neither accords with any permissible standard of measuring damages. Each opens an easy road to antitrust riches.

---

[6] Throughout the computation, in referring to Switzer's sales, the master used *net sales for Switzer* even while using *gross sales for Radiant.*

(iv) "Lost sales" award rests on estimates short of standards the law requires—or should.

The owners of Radiant's business, Locklin and Brant, were not permitted by their counsel to testify to the damage suffered. It was obvious that their views were not in accord with the testimony of their "experts." When the master observed "neither one of your clients here made any estimates" of damage (R. 1429), counsel replied "that was done deliberately and intentionally * * *." (R. 1429.) Counsel explained:

> "As a matter of fact, their judgment, if I were to use their estimate, *their judgment in this is so ridiculous* as to what they would have done, *that your Honor couldn't believe it.* Mr. Locklin, in 1951 said, 'We can't do any more business than we are,' and his sales went up later.
>
> In 1953, he said, 'We are not hurt,' whereas the sales curve showed they were hurt.
>
> Mr. Locklin and Mr. Brant were just people making and selling this paint. I submit that neither of them had as much competency to testify as to what their business was than these experts. *They constantly said and constantly thought that they weren't being hurt.*" (R. 1430.)

Damage, obviously, was in the minds of the "experts" only—it was not in the minds of the principals, the owners of Radiant's business.

Of the three "experts" offered by Radiant, the master rejected one outright, and relied on the other two—accountants who had no experience in, or knowledge of, the business, and based the estimates they gave on reading the decision and Appendix on the prior appeal. This reading produced "lost sales" that continued to grow the greater the lapse of time since the termination of the antitrust violation.

The master accepted the "lost sales" figures of one of Radiant's experts for two of the years and of the other expert for four years (and made up his own for the remaining two years). However, the estimates the master accepted:

1. Radiant's "experts" said they rested on assumptions the master found not true, and

2. Were built by Radiant's "experts" from, and supported only by, figures for other years which the master rejected.

The nearest parallel is in ancient maps which show the world resting on the shoulders of Atlas, and Atlas standing on—nothing.

(v) If errors in arithmetic alone are corrected, the profit rate on "lost sales" will be 15%, and not the 16% here allowed.

In the five years after the master found all effects of the antitrust violation ended, Radiant earned 10% on sales.

In computing damages, the master allowed 16% on what he called "lost sales."

If every determination made by the master is accepted, and his method of calculating the 16% is followed precisely, and errors in arithmetic alone corrected, the result will be a profit rate of 15%—not 16%.

The foregoing considerations show compelling need for a statement of standards to be applied in measuring antitrust damages. They reveal also need for clarification of the duty laid on reviewing courts by—

—The Clearly Erroneous Rule.

The circumstance that findings come with the formidable support given them by Rules 52(a) and 53(e)(2), *makes it the more important* that at some stage some court determine, as a judicial matter, whether they meet that test.

Here there has been no such review.

In a small business, where, *in the eight years* covered by the award, Switzer's sales totalled *$4,155,517.62*, it now is adjudged that Radiant "lost sales" of *$1,966,600*, and the judgment amounts to *$1,145,387.73*. This attributes to Radiant in the first eight years of its business, which began January 1, 1949, with "two years of preparation" (App. p. 2), *sales $313,983 greater than Switzer managed to achieve in the same period after "fifteen years of preparatory work"* with fluorescent colors. (App. p. 2, MR p. 184 ¶ 85; R. 1464, 1472, 1812.)

This is a measure of the extravagantly swollen character of the "lost sales" award.

The District Court considered its obligation under the Rule discharged on the ground:

> "I am going to have to rely on the Master's—the Master heard the witnesses and he had the documentary evidence and he has carefully gone over it." [7]

The Court of Appeals, assuring the parties they "are entitled to a real review" (App. p. 4), *did not even correct mistakes in arithmetic*; it remained unmoved by the "numerous flaws and inconsistencies" (App. p. 18) of the judgment that cry for correction, if review is to be more than empty farce.

---

[7] Hearing before the District Court on January 24, 1969, page 37.

Consider that here is a case where:

$275,328 is written into the judgment by calculating "lost sales" (in the first six years) on the basis of *gross* sales—treating as sales "lost" even merchandise returned by customers because it was "unsatisfactory"—and then applying multiplying factors thereto, year by year, that further inflate the error.

$68,400 is added to the judgment by the switch to a different, and equally indefensible, method of computing "lost sales" in the seventh and eighth years—measuring this time from Radiant's *net* sales in the manner described, guaranteeing inflation of the award.

$58,998 is written into the judgment by mistakes in arithmetic—by which the master arrived at the 16% profit rate.

$226,992 is added to the judgment by awarding damages for asserted "lost sales" of paper and silk screen colors in 1949-1951 even though the prior adjudication determined damages did not commence on these items until 1952 and 1953.

These items alone account for *more than half of the judgment*, i.e., $629,718 out of the total judgment of $1,145,387.73.

—Attorney's Fee.

Included in the judgment are attorney's fees totaling $198,201. (App. p. 9.) Under counsel's contingent fee arrangement (R. 1541), counsel's portion will exceed a quarter million dollars. (One must say counsel who can

support this judgment by the rope of sand that is this record deserves to be paid on that order of magnitude.)

The allowance includes pay for work on issues unnecessary to the litigation, and that, to boot, were lost. The trial before Judge Miner took three weeks; of these two weeks (R. 405) were devoted to Radiant's effort to prove "that the Switzers were guilty of bad faith and were guilty of malice" (R. 404). When Judge Miner questioned the point, counsel conceded it was not necessary to prove this. (R. 404.) But counsel persisted.

After two weeks of effort, Radiant lost the point. Judge Miner found Switzer acted:

> "without malice or bad faith" (Finding 20, App. p. 39)

and the Court of Appeals agreed Switzer's conduct was:

> "in good faith without a conscious purpose to violate the antitrust laws." (297 F.2d at 49, App. p. 69.)

Now counsel is paid for spending two-thirds of the trial in losing the issue. To impose such a penalty for warding off charges adjudged to be groundless is not in the interest of the antitrust laws.

The fees allowed, moreover, are based on allocations of time charges, made from recollection going back as much as ten years. The Court of Appeals knew of "no rule which requires the master to make a finding only on contemporary records * * *." (App. p. 9.) Such records could have been kept—for they were in a few instances. (R. 373, 420, 426.)

If, as the Court of Appeals determined, there is no rule, this Court should see to it that there is one—where immense sums are to be claimed.

Observe next—

—The Settlement.

Radiant sued Sherwin-Williams and others in California as joint participants with Switzer in the same wrong for which damages are here awarded. Radiant settled its claims against Sherwin-Williams without reserving rights against the other defendants in the California action or against Switzer.

The master found, and the Court of Appeals agreed:

> "The California conspiracy suit involved the same wrongs here asserted, Sherwin-Williams would do no business with Radiant until the law suit was dismissed, the former making it clear that a one-year supply contract for Radiant's pigments would be waiting upon dismissal, Radiant dismissed the suit 'in anticipation of' the supply contract, and the contract was executed." (App. p. 7.)

From these findings only one conclusion can follow: Radiant settled its claims against Sherwin-Williams. When it did so without reserving rights against others, its claims against other joint tortfeasors, on the facts found, vanished by operation of law.

—Treble Damages.

The statute says a person injured by anything forbidden in the antitrust laws "shall recover threefold the damages by him sustained * * *." 15 U.S.C.15.

The question whether damages must be trebled, willy-nilly, has never been ruled on by this Court. There is, of course, a great deal of language in the cases about award of treble damages but—so far as can be found—never in response to challenge on this point.

The question has been expressly raised only in the lower courts. The result is an even division of authority.

In the Courts of Appeals (prior to this case), the Fifth and Seventh Circuits split, *viz.*:

Sun Theatre Corp. v. RKO Radio Pictures, Inc. (7 C.A., 1954), 213 F.2d 284, Judges Lindley, Major and Duffy held the statute *requires* treble damages, but, in

Rogers v. Douglas Tobacco Board of Trade, Inc. (5 C.A., 1957), 244 F.2d 471, certiorari denied (1959), 361 U.S. 833, Judges Rives, Hutcheson and Brown held the statute *does not require* trebling in every case.

Similarly, in the District Courts, there is an even division, *viz.*:

Cicero Amusement Co. v. RKO Radio Pictures (N.D. Ill., 1953), CCH 1953 Trade Cases, ¶ 67,520, Judge LaBuy held the statute *requires* treble damages, but, in

Haskell v. Perkins, (D.C. N.J., 1928), 28 F.2d 222, reversed on other grounds (3 C.A., 1929), 31 F.2d 53, certiorari denied (1929), 279 U.S. 872, Judge Runyon held the statute *does not require* trebling in every case.

REASONS FOR ALLOWANCE OF WRIT.

The Court should grant the writ because the judgment below shows:

I. Standards governing damages in private antitrust suits desperately need to be clarified. This Court has had occasion to deal at length with substantive offenses under the anti-trust laws; it has not dealt with standards governing the award of damages since *Eastman Kodak* (1927), 273 U.S. 359, *Story Parchment* (1931), 282 U.S. 555, *Bigelow* (1946), 327 U.S. 251, and *Zenith Radio* (1969), 395 U.S. 100—and, even then, not at all with the bread and butter problems that flow from this record. The judgment below dramatizes need for guidance. Consider that the judgment in this case:

—(a) *Disregards adjudicated findings* of the prior proceedings, raising question whether findings are to be deemed good only on the day of judgment—and thereafter left at large.

—(b) *Includes losses not caused by antitrust violation,* but produced by the claimant's own deficiencies. The master found:

> "That Radiant had serious product and sales problems in the silk screen and coated paper business during the period in question is amply supported by the record" (MR p. 141 ¶ 12)

and then held Switzer must pay for losses so caused.

—(c) *Counts as "lost sales" goods returned because customers found the product "unsatisfactory."* The master found the product was withdrawn from the market because of its quality deficiencies. To such items, and others having no relation to antitrust violation, the award applies multiplying factors that further inflate damages unconscionably.

—(d) *Substitutes for appraisal by the owners, estimates by "experts"* whose knowledge of the business came from reading portions of the record. Money should not be so "estimated" from one man's pocket into another's.

—(e) *Converts mistakes in arithmetic into damages.* Something is amiss when mistakes in adding figures become damages.

Such departures from the accepted and usual course of judicial proceedings should not be countenanced. They reveal imperative need for specification of standards to be observed in counting anti-trust damages.

II. Clearly erroneous rule has been misapplied. This Court should make clear that the rule is *not* a device to relieve courts of the need for review, but, instead, requires that somewhere, some court, judicially consider whether the findings meet the test. Findings that are, as here, at war, one with another, do not pass that test.

III. Standards governing attorney's fee allowances in private antitrust suits need to be declared. It should not be left to the finder of the facts to exercise his judgment when the claim is based on allocations made from recollection, nor should allowance be made for work in losing issues.

IV. Joint tortfeasor rule should be held to apply to antitrust actions equally with others. The point has not been ruled on by this Court. It should be. The findings establish the settlement. All that remains is to apply the rule.

V. Whether statute requires damages to be trebled should be determined. This Court has not ruled on the point; below, four courts have dealt with the question, and have divided two to two.

CONCLUSION.

This case brings here questions immensely important in the administration of the antitrust laws. They need the attention of this Court.

Respectfully submitted,

THOMAS V. KOYKKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

October 15, 1970.